Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — APPLICATION NO BKA-2–10 OF 2019 (W)
AZAHAR MOHAMED CJ (MALAYA)
11 NOVEMBER 2019

Civil Procedure — Jurisdiction — Original jurisdiction of Federal Court — Applicant sought leave to file proceedings in Federal Court for declaration that Parliament had no power to enact provisions in Education Act 1996 allowing Education Minister to establish vernacular schools where medium of instruction was not in the national language — Whether leave application wholly misconceived as applicant was seeking declaration that impugned provisions invalid because Parliament legislated on matter with respect to which it had no power to make laws — Whether applicant could not rely upon arts 4(3) and (4) of Federal Constitution or move Federal Court to exercise its original jurisdiction under art 128(1)(a) of Federal Constitution — Whether Federal Constitution clearly provided that Parliament had power to make laws relating to field of Education including the impugned provisions — Whether applicant's real complaint was that impugned provisions invalid for conflicting with art 152 of Federal Constitution which declared Malay language as national language — Whether such challenge should properly be brought before the High Court and not before the Federal Court in the exercise of its original jurisdiction

The instant application sought leave of a Federal Court judge, under art 4(4) of the Federal Constitution, for the applicant to file proceedings to seek the Federal Court's ruling on a matter in the exercise of its original jurisdiction under art 128(1)(a) of the Federal Constitution ('the Constitution'). The matter was a declaratory order sought by the applicant against the respondents that Parliament had no power by virtue of art 152 of the Constitution to enact ss 17 and 28 of the Education Act 1996 ('the impugned provisions'), and which were thereby invalid, to give the Minister of Education discretionary power to establish national-type Chinese and Tamil primary schools where the medium of instruction was not in the national language. The impugned provisions provided that the national language shall be the main medium of instruction in all educational institutions except in a national-type school established by the Minister or in any other educational institution exempted from the ruling. The applicant argued that even if Parliament had power under the Constitution to enact laws pertaining to matters of Education, such power had to be exercised without violating art 152 of the Constitution which provided for the Malay language to be the national language. The respondents, on the other hand, argued that the applicant's leave application was wholly misconceived because

the declaration sought did not meet the requirements of art 4(3) of the Constitution which could be invoked only if the validity of any law was questioned on the ground that it provided for matters with respect to which Parliament had no power to make laws. The respondents submitted that the Constitution clearly empowered Parliament to legislate upon matters of education including the impugned provisions. The respondents said that the applicant's real complaint was that the impugned provisions were invalid for violating art 152 of the Constitution but such a complaint did not fall within arts 4(3) or (4) and, consequently, the leave application should be dismissed.

Held, dismissing the leave application:

(1) It was well within Parliament's power to enact the impugned provisions. As the legislative competency of Parliament to enact the impugned provisions was not in issue, the question of obtaining leave under art 4(4) of the Federal Constitution did not arise. The leave application was wholly misconceived and had to be dismissed (see paras 36–37).

(2) Parliament's legislative competency was clearly stipulated in art 74(1) of the Federal Constitution which provided that Parliament could make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List, that is to say, the First or Third List set out in the Ninth Schedule. The impugned provisions were areas on which Parliament could make laws with respect to the matter of 'Education'. The matter of 'Education' was clearly spelt out under Item 13 of the First List in the Ninth Schedule. Although the word 'Education' in Item 13 was followed by a number of examples or illustrations, this did not curtail the effect of the general word 'education'. Article 74(4) of the Federal Constitution expressly provided that where general as well as specific expressions were used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule, the generality of the former shall not be taken to be limited by the latter. The specific words in the entry by way of examples or illustrations, therefore, served to amplify rather than to restrict the scope of the general word (see paras 31 & 34–35).

(3) The applicant's main contention was that the national-type Chinese and Tamil schools established by the Minister of Education pursuant to the impugned provisions were contrary to art 152 of the Federal Constitution that provided for the Malay language to be the national language. In substance, the primary declaration sought for in the present case was that the impugned provisions were inconsistent with art 152. If so, they would be void by reason of art 4(1). This was not a case where a declaration was sought that the impugned provisions were invalid on the ground that they were related to a matter with respect to which Parliament had no power to make laws. Hence, the declaratory reliefs sought by the applicant were not within the exclusive jurisdiction of the

Federal Court and did not come within the ambit of arts 4(3) and (4) of the Federal Constitution. The declaratory reliefs sought for were within the original jurisdiction of the High Court which was the competent forum to hear such challenges (see paras 19 & 22).

[Bahasa Malaysia summary

Permohonan ini memohon kebenaran hakim Mahkamah Persekutuan, di bawah perkara 4(4) Perlembagaan Persekutuan, bagi pemohon untuk memfailkan prosiding untuk mendapatkan keputusan Mahkamah Persekutuan mengenai sesuatu perkara dalam menjalankan bidang kuasa asalnya di bawah perkara 128(1)(a) Perlembagaan Persekutuan ('Perlembagaan'). Perkara itu adalah perintah pengisytiharan yang dipohon oleh pemohon terhadap responden bahawa Parlimen tidak mempunyai kuasa berdasarkan perkara 152 Perlembagaan untuk meluluskan ss 28 dan 17 Akta Pendidikan 1996 ('peruntukan yang dipersoalkan'), dan yang dengan itu tidak sah, untuk memberikan kuasa budi bicara Menteri Pendidikan untuk menubuhkan sekolah rendah jenis bahasa Cina dan Tamil di mana bahasa pengantarnya bukan dalam bahasa kebangsaan. Peruntukan yang dipersoalkan menyatakan bahawa bahasa kebangsaan akan menjadi medium arahan di semua institusi pendidikan kecuali di sekolah jenis nasional yang ditetapkan oleh Menteri atau di lembaga pendidikan lain yang dikecualikan daripada perintah. Pemohon berpendapat bahawa walaupun Parlimen mempunyai kuasa di bawah Perlembagaan untuk membuat undang-undang berkaitan dengan perkara pendidikan, kuasa sedemikian perlu dilaksanakan tanpa melanggar perkara 152 Perlembagaan yang memperuntukkan bahasa Melayu menjadi bahasa kebangsaan. Sebaliknya, responden berpendapat bahawa permohonan kebenaran pemohon adalah salah nyata kerana pengisytiharan yang dipohon tidak memenuhi syarat-syarat perkara 4(3) Perlembagaan yang boleh digunakan hanya jika kesahihan mana-mana undang-undang dipersoalkan atas alasan bahawa ia memperuntukkan perkara-perkara yang Parlimen tidak mempunyai kuasa untuk membuat undang-undang. Responden berhujah bahawa Perlembagaan jelas memberi kuasa kepada Parlimen untuk membuat undang-undang mengenai perkara-perkara Pendidikan termasuk peruntukan yang dipersoalkan. Responden mengatakan bahawa aduan sebenar pemohon adalah bahawa peruntukan yang dipersoalkan adalah tidak sah kerana melanggar perkara 152 Perlembagaan tetapi aduan tersebut tidak termasuk dalam perkara 4(3) atau (4) dan, akibatnya, permohonan kebenaran itu harus ditolak.

Diputuskan, menolak permohonan kebenaran:

(1) Ia berada di dalam kuasa Parlimen untuk menggubal peruntukan yang dipersoalkan. Memandangkan kecekapan perundangan Parlimen untuk menggubal peruntukan yang dipersoalkan itu tidak timbul, persoalan mendapatkan kebenaran di bawah perkara 4(4) Perlembagaan

Persekutuan tidak timbul. Permohonan kebenaran ini telah disalah anggap sepenuhnya dan terpaksa ditolak (lihat perenggan 36–37).

(2) Kompetensi perundangan Parlimen jelas dinyatakan dalam perkara 74(1) Perlembagaan Persekutuan yang memberikan Parlimen boleh membuat undang-undang berkenaan dengan mana-mana perkara yang disebut dalam Senarai Persekutuan atau Senarai Semasa, iaitu, Senarai Pertama atau Ketiga dinyatakan dalam Jadual Kesembilan. Peruntukan yang dipersoalkan adalah bidang di mana Parlimen boleh membuat undang-undang berkenaan dengan masalah 'Pendidikan'. Perkara 'Pendidikan' jelas dinyatakan di bawah Item 13 Senarai Pertama dalam Jadual Kesembilan. Walaupun perkataan 'Pendidikan' dalam item 13 diikuti oleh beberapa contoh atau ilustrasi, ini tidak menyekat kesan perkataan 'pendidikan' umum. Perkara 74(4) Perlembagaan Persekutuan dengan jelas memperuntukkan bahawa di mana ungkapan umum dan khusus digunakan dalam menerangkan mana-mana perkara yang disebutkan dalam Senarai yang dinyatakan dalam Jadual Kesembilan, keluasan yang terdahulu tidak boleh dibatasi oleh yang terakhir. Oleh itu, kata-kata khusus dalam kemasukan melalui contoh atau ilustrasi, memperluas bukannya melarang skop kata umum (lihat perenggan 31 & 34–35).

(3) Hujahan utama pemohon adalah sekolah-sekolah Cina dan Tamil yang ditubuhkan oleh Menteri Pelajaran berdasarkan peruntukan yang dipersoalkan tidak sesuai dengan perkara 152 Perlembagaan Persekutuan yang menyatakan bahasa Melayu sebagai bahasa kebangsaan. Secara dasarnya, pengisytiharan utama yang dipohon dalam kes ini adalah bahawa peruntukan yang dipersoalkan adalah tidak konsisten dengan perkara 152. Jika ya, mereka akan menjadi tidak sah oleh sebab perkara 4(1). Ini bukanlah satu kes di mana perisytiharan telah dipohon bahawa peruntukan yang dipersoalkan adalah tidak sah atas alasan bahawa mereka berkaitan dengan perkara yang Parlimen tidak mempunyai kuasa untuk membuat undang-undang. Oleh itu, relif pengisytiharan yang dipohon oleh pemohon tidak berada dalam bidang kuasa ekslusif Mahkamah Persekutuan dan tidak termasuk dalam perkara 4(3) dan (4) Perlembagaan Persekutuan. Relief pengisytiharan yang dipohon adalah dalam bidang kuasa asal Mahkamah Tinggi yang merupakan forum yang kompeten untuk mendengar bantahan tersebut (lihat perenggan 19 & 22).]

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)
Alma Nudo Atenza v Public Prosecutor and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (folld)
Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni

Almarhum Sultan Abu Bakar Ri' Ayatuddin Al Mu' Adzam Shah [1996] 1 MLJ 617 (refd)
Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417, FC (refd)
Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals [1997] 3 MLJ 23, CA (refd)
Mamat bin Daud & Ors v Government of Malaysia [1986] 2 MLJ 192, SC (refd)
Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243, FC (refd)
Nordin bin Salleh v Kerajaan Negeri Kelantan & Anor [1993] 3 MLJ 344; [1993] 4 CLJ 215, SC (refd)
Petroliam Nasional Bhd (Petronas) v Kerajaan Negeri Sarawak [2018] MLJU 1371; [2018] 10 CLJ 433 (refd)
State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors [2015] 6 MLJ 736; [2015] 6 MLRA 117, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 83
Education Act 1996 ss 17, 28
Federal Constitution arts 4, 4(1), (3), (4), 5, 8, 8(1), 9, 10, 74, 74(1), (3), (4), 128, 128(1), (1)(a), 152, 159(5), 182, Ninth Schedule, item 13 Chapter 1, Part VI
Firearms (Increased Penalties) Act 1971
Universities and University Colleges Act 1971 s 6

Dato' Shaharudin bin Datuk Ali (Hj Abdul Rahim bin Sinwan, Aidil bin Abdul Khalid, Muhammad Noor Azfar bin Noor Azmi, Syed Mohamed Afiq Jamalullail bin Syed Mohamed Noor Azmi and Nur Aifaa bt Mohd Zain with him) (Azam Aziz Shaharudinali & Co) for the appellant.
Alice Loke Yee Ching (Shamsul Bolhassan with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.
Zainul Rijal bin Abu Bakar (Noor Adzrie bin Mohd Noor and Muhd Akmal bin Abu Bakar with him) (Zainul Rijal Talha & Amir) observer for Prof Emeritus Dr Hashim bin Yaacob.
M Reza Hassan (Mohd Zubir bin Embong and Zulkifli Noordin with him) (Raja Riza & Assoc) observer for ISMA.
Nur Syafina Nasir (Harmy Yusoff & Azli) observer for PUTRA.
Mohamed Haniff bin Khatri Abdulla (Abi Mursyidin bin Awal with him) (Amelda Fuad Abi & Aidil) observer for Majlis Pembangunan Pendidikan Islam Malaysia (MAPPIM) dan Gabungan Pelajar Melayu Semenanjung.
Gurdial Singh Nijar (Wong Kong Fatt, Lim Hoon Shi, Lim Yan Shan and Abraham Au Tian Hui with him) observer for Pihak United Chinese School Committees' Association Of Malaysia ('Dong Zong') dan United Chinese School Teachers' Assoc Of Malaysia ('Jiao Zong').

Bastian Vendargon (T Gunaseelan, Gene Vendargon and R Karnan) observer for Majlis Bahasa Cina Malaysia & Persatuan Tamil Neri Malaysia.
Raja Kuppan (Rajoo & Assoc) observing in a personal capacity.
MJ Ganesan (J Ganesan Tajul Anuar & Co) observing in a personal capacity.

Azahar Mohamed CJ (Malaya):

INTRODUCTION

[1] I heard this leave application on 4 November 2019 and reserved my decision. Today after much deliberation, I am ready with my decision.

[2] This leave application made under art 4(4) of the Federal Constitution by notice of motion is before me in my capacity as a judge of the Federal Court. As a starting point, it is important to highlight that leave referred to in art 4(4) is leave to bring the matter before the Federal Court in its original jurisdiction. In the main, the Federal Court is an appellate court; its exclusive original jurisdiction is very limited.

[3] In the present application, the applicant seeks to invoke the exclusive original jurisdiction of the Federal Court under art 128(1)(a) of the Federal Constitution. With the exception of the Federal Court, no other court in the land has this distinct and exclusive jurisdiction. As we shall see later in this judgment, only challenges as to the competence of the legislative body to enact a law fall within the exclusive original jurisdiction of the Federal Court; all other grounds of challenge to the constitutional validity of a law are within the jurisdiction of the High Court and ought not be litigated at the first instance before the Federal Court so that aggrieved litigants are not deprived of their right of appeal to the highest court in the land. It bears emphasis that not all constitutional challenges on the validity of a law come under the exclusive original jurisdiction of the Federal Court.

THE NOTICE OF MOTION

[4] By way of this amended notice of motion, the applicant seeks leave to commence proceedings against the respondents in the Federal Court in the exercise of its original jurisdiction for the following declaratory reliefs:

(a) Perintah deklarasi bahawa Parlimen tidak mempunyai kuasa untuk membuat ss 28 dan 17 Akta Pendidikan 1996 [Akta 550] dan adalah terbatal kerana Parlimen tidak mempunyai kuasa memberi kuasa budibicara kepada Menteri Pendidikan menubuhkan Sekolah Rendah Jenis Kebangsaan Cina dan Sekolah Rendah Jenis Kebangsaan Tamil kerana Perkara 152 Perlembagaan Persekutuan tidak memberi kuasa sedemikian kepada Parlimen;

(b) Bahawa Mahkamah memberikan perintah-perintah lain atau perintah susulan yang wajar dan suai manfaat bagi perjalanan prosiding ini; dan

(c) Tiada perintah untuk kos.

[5] The first thing to notice is that the manner in which this notice of motion is drafted, what stands out as a matter of substance is that the applicant sought for a declaration that Parliament has no power to enact ss 28 and 17 of the Education Act 1996 ('the impugned provisions') and are invalid for the reasons that it has no power to accord discretionary powers to the Minister of Education to establish national type schools as art 152 of the Federal Constitution does not empower Parliament to do as such.

THE IMPUGNED PROVISIONS

[6] By way of background, it must be emphasised that the declaration sought by the applicant centers on the impugned provisions that provide as follows:

17 National language as the main medium of instruction

(1) The national language shall be the main medium of instruction in all educational institutions in the National Education System except a national-type school established under section 28 or any other educational institution exempted by the Minister from this subsection.

(2) Where the main medium of instruction in an educational institution is other than the national language, the national language shall be taught as a compulsory subject in the educational institution.

28 Establishment and maintenance of national and national-type schools

Subject to the provisions of this Act, the Minister may establish national schools and national-type schools and shall maintain such schools.

[7] As the key to the determination of this leave application revolves around the proper construction of art 128 and cll (3) and (4) of art 4 of the Federal Constitution, I need now to turn my attention to, and look more closely at the various relevant provisions of the Federal Constitution.

[8] First, art 128(1) of the Federal Constitution that stipulates on the exclusive original jurisdiction of the Federal Court to determine whether a law made by Parliament is invalid on the ground that Parliament has made provision with respect to a matter, which Parliament has no power to make laws. The article reads as follows:

128 Jurisdiction of Federal Court

(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to

A determine in accordance with any rules of court regulating the exercise of such jurisdiction —

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the B Legislature of the State has no power to make laws; and

(b) disputes on any other question between States or between the Federation and any State.

(2)–(3) ...

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[9] The next relevant provision of the Federal Constitution is art 4. Clauses (3) and (4) of art 4 of the Federal Constitution in particular provides the grounds in which the validity of any law made by Parliament or the *Legislature* of any State can be challenged by way of a proceeding for a D declaration that the law is invalid and such proceeding shall not be commenced without the leave of a judge of the Federal Court. Clauses (3) and (4) of art 4 read as follows:

4 Supreme law of the Federation

E (1)–(2)...

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is F invalid on that ground or —

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) If the law was made by the Legislature of a State, in proceedings between the Federation and that State. G

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any H State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[10] In short, art 4(3) allows a law to be challenged on the ground that Parliament has legislated on a matter that it had no power to do so.

I

[11] This brings me to the judgment of the Federal Court in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 ('Ah Thian'). This case represents the law on the subject matter as we apply today in relation to the jurisdiction of the courts to declare a law invalid. In this case, Suffian LP in delivering the

judgment of the Federal Court put in plain words that validity of a law could be challenged on one of the three grounds as follows:

(1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, Article 74; or

(2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see Article 4(1); or

(3) in the case of State written law, because it is inconsistent with Federal law, Article 75.

Suffian LP went on to say:

> The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.

[12] The Federal Court in *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 ('Gin Poh Holdings') reaffirmed the position in *Ah Thian* whereby the applicability of arts 4(3), 4(4) and 128(1)(a) is confined to situations where Parliament or the State *Legislature* has strayed beyond matters within their legislative competence based on the constitutional provisions in the legislative lists in the Ninth Schedule of the Federal Constitution.

[13] Recently, Ahmad Maarop (CJ Malaya) (as His Lordship then was) in *Petroliam Nasional Bhd (Petronas) v Kerajaan Negeri Sarawak* [2018] MLJU 1371; [2018] 10 CLJ 433 held that arts 4(3), (4) and 128(1)(a) of the Federal Constitution apply only where the validity of a law is challenged on the ground that it 'makes provision with respect to a matter with respect to which Parliament or, as the case may be, the *Legislature* of the State has no power to make laws'. It was held that the declaratory reliefs sought by the applicant did not come within the ambit of cll (3) and (4) of art 4. Hence, the declaratory reliefs sought by the applicant were not within the exclusive original jurisdiction of the Federal Court. The declaratory reliefs sought were within the original jurisdiction of the High Court. Thus, the question of leave under art 4(4) did not arise.

[14] Therefore, not all constitutional challenges on the validity of a law falls within the situation envisaged in cll (3) and (4) of art 4 of the Federal Constitution. It is with this principle in mind that I approach the present issues that call for my determination in the present application.

SUBMISSION OF THE APPLICANT

[15] The arguments of learned counsel for the applicant in support of this leave application can be summarised as follows. Parliament has no power to make an Act or to make any provision in an Act in violation of an express condition set out in art 152 of the Federal Constitution. In *State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors* [2015] 6 MLJ 736; [2015] 6 MLRA 117 ('Muhammad Juzaili'), the Federal Court held that the net effect of such contention was that the legislature had no power to make such law and therefore the applicant ought to have invoked art 4(4) of the Constitution, because the civil liberty provisions of the Constitution would not permit that State *Legislature* to pass such a law, ie *Legislature* would have no power to pass it. Reference is made to art 159(5) of the Federal Constitution where Parliament has no power to amend art 152 of the Federal Constitution without the consent of the Conference of Rulers. Parliament has no power to legislate on vernacular schools when art 152 of the Federal Constitution does not authorise it. The impugned provisions seek to enable a Minister to establish vernacular schools that do not use the national language as the medium of instruction — this is on all fours with *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243 ('Merdeka University'). Parliament cannot pass the impugned provisions because of the prohibition contained in art 152 of the Federal Constitution. The legislative power of Parliament to enact laws pertaining to education under item 13 of Schedule 9 is not absolute as stated in art 74(3). Such legislative power must certainly be consistent with art 152 of the Federal Constitution.

SUBMISSION OF THE RESPONDENTS

[16] The position taken by the learned SFC is this. For leave to be granted, the applicant has to satisfy this court that leave is necessary under art 4(4) of the Federal Constitution and that the application is not frivolous (citing *Mamat bin Daud & Ors v Government of Malaysia* [1986] 2 MLJ 192). The applicant has not sought for a declaration that a law is invalid on the ground that Parliament has no power to make the said law. The declaration sought by the applicant does not meet the requirements of art 4(3) as art 4(3) allows for a law to be challenged on the ground that Parliament has legislated on a matter that it had no power to do so. The declaration sought must be to the effect that the impugned law is invalid on the ground that Parliament has made provision with respect to any matter which Parliament has no power to make laws. The sole ground of challenge permissible under art 4(3) of the Federal Constitution is that Parliament has legislated on a matter, which is not within its legislative powers. In other words, Parliament did not have the legislative competency to enact the impugned provision. The issue of legislative competency is to be decided by reference to matters falling within Parliament's power to legislate. The distribution of legislative power is housed in Chapter 1, Part VI of the

Federal Constitution, which provides for the distribution of legislative powers between the Federation and the States. Education is clearly a subject matter falling within the Federal List of the Ninth Schedule, listed as item 13. Therefore, the impugned provisions fall under the matters enumerated in the Federal List in which Parliament is empowered to enact (citing *Ah Thian, Nordin bin Salleh v Kerajaan Negeri Kelantan & Anor* [1993] 3 MLJ 344; [1993] 4 CLJ 215 ('Nordin bin Salleh') and *Gin Poh Holdings*). The real crux of the applicant's complaint is with regard to the validity of the impugned provisions in allowing national type schools to be established. The applicant claims that to do so is contrary to the provisions of art 152 providing for the Malay language to be the national language. However this type of challenge does not fall within art 4(3).

[17] The rival contentions of the parties bring into focus the fundamental issue that I have to consider: whether the present application comes under art 4(4) of the Federal Constitution so that leave of a judge of the Federal Court is required.

DECISION

[18] Before turning to the rival contentions of the parties, I will first deal with the case of *Muhammad Juzaili*. In that case the validity of a State enactment was challenged on the ground that it offended the fundamental liberties in arts 5, 8, 9 and 10 of the Federal Constitution. The Federal Court held that the challenge could only be made via the specific procedure provided for under cll (3) and (4) of art 4. Learned counsel for the applicant in the present case submitted that applying the principles enunciated in *Muhammad Juzaili*, the present application comes within the ambit of cll (3) and (4) and art 4 for the reason that the impugned provisions offended art 152. However, recently, a bench of nine judges of the Federal Court in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780 ('Alma Nudo') in declining to follow *Muhammad Juzaili* clarified that the wide interpretation adopted in the latter case is contrary to the clear wordings of cll (3) and (4) of art 4. In *Alma Nudo*, the Federal Court held that the challenge did not fall within the scope of art 4(4) and leave was not required from the court as the validity of the relevant provision was not challenged on the ground it related to a matter in which Parliament had no power to make laws. Applying the principles articulated in *Alma Nudo* to the present application, I am unable to accept the argument of learned counsel for the applicant on this point.

[19] As it can be understood from the submissions of learned counsel for the applicant, the main contention of the applicant is that the national-type Chinese and Tamil schools or commonly known as vernacular schools, that are established by the Minister of Education pursuant to the impugned provisions

A are contrary to the provisions of art 152 of the Federal Constitution that provides for the Malay language to be the national language. On the face of it, the applicant has not sought for a declaration to the effect that the impugned law is invalid on the ground that Parliament 'makes provision with respect to a matter with respect to which Parliament has no power to make laws'.

B

[20] There is another point worth noting. The applicant's case is reinforced in his supporting affidavit whereby, among others, the following averments were made:

C

> 49. Saya telah dinasihati dan sesungguhnya percaya bahawa Parlimen juga tidak mempunyai kuasa untuk membuat Seksyen 28 dan 17 Akta Pendidikan 1996 kerana:
>
> a. Fasal 152 (1)(a) Perlembagaan Persekutuan adalah salah satu peruntukan teras (fundamental) di dalam perlembagaan memandangkan Fasal 152 Perlembagaan tidak boleh diubah walaupun negara sedang di dalam peperangan ataupun darurat mengikut Fasal 150(6A) Perlembagaan. Ini menunjukkan betapa mustahaknya Bahasa Kebangsaan dalam konteks Perlembagaan dan negara bangsa.
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> b. ...
>
> c. ...
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> d. Bahasa Melayu di bawah Fasal 152(1)(a) Perlembagaan dipelihara oleh Majlis Raja-Raja dan tiada pindaan ke atasnya adalah sah tanpa perkenan Majlis Raja-Raja di bawah Fasal 159(5) Perlembagaan. Ini jelas menunjukkan bahawa Bahasa Kebangsaan itu adalah sesuatu yang teras dan paksi kepada kemantapan negara bangsa.
>
> e. Parlimen tiada kuasa memberikan budi bicara untuk menubuhkan sekolah-sekolah rendah di Malaysia yang tidak mematuhi kehendak Fasal 152 (1)(a) Perlembagaan.
>
> f. Sekolah vernakular bukanlah dikecualikan daripada Fasal 152 Perlembagaan.
>
> g. Sekolah vernakular tidak dilindungi oleh Fasal 152 (1)(a) Perlembagaan seperti yang pernah dihebohkan oleh sesetengah pihak selama ini.
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> 51. Parlimen tidak mempunyai kuasa untuk membuat seksyen 28 dan 17 Akta Pendidikan 1996 kerana 'the pith and substance' kedua-dua seksyen tersebut adalah daripada sumber kuasa yang tidak sah kerana Parlimen tidak bebas meloloskan dirinya dari kehendak Fasal 152 (1)(a) Perlembagaan (Parliament cannot unshackle itself from the clear restraints of Article 152).
>
> 53. Saya menyatakan bahawa penggunaan Bahasa selain daripada Bahasa Kebangsaan sebagai Bahasa pengantar utama di sekolah-sekolah vernacular berkenaan telah menjadikan kewujudan sekolah-sekolah vernacular berkenaan sebagai tidak selaras dengan Fasal 152(1)(a) dan Fasal 152(6) Perlembagaan Persekutuan.

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54. Saya tahu bahawa Jadual 9, Senarai Persekutuan (Federal list) di item atau perkara 13 ada menyenaraikan 'pendidikan rendah dan menengah' sebagai bidangkuasa Parlimen Persekutuan.

Namun saya menyatakan bahawa:

a. Perkara 13, Jadual 9 tersebut tidak sekali kali bermakna bahawa Parlimen berkuasa membuat seksyen 28 dan 17 Akta 550 dengan cara yang [dengan izin] 'subvert' Fasal 152 berkaitan kedaulatan bahasa Kebangsaan.

b. Fasal 152 mengandungi satu peringatan dan juga larangan akan penggunaan bahasa selain daripada bahasa Kebangsaan bagi hal maksud rasmi.

c. bahawa adalah jelas pendidikan dan pembelajaran di sekolah rendah dan menengah dibawah Akta 550 adalah satu hal rasmi, dan bukan sebaliknya.

d. kebolehgubalan rang undang-undang atau akta Parlimen mestilah tertakluk kepada Fasal 152 juga, kerana mahkamah telah menetapkan dalam kes kes bahawa perlembagaan itu mestilah dibaca tertakluk kepada Fasal-fasal lain didalam perlembagaan yang berkaitan.

e. Perkara 13, Jadual 9, tidak memberikan pengecualian daripada operasi Fasal 152 (does not exclude it from the operation of Article 152).

[21] It can be seen from the foregoing discussion that the real crux of the applicant's case is that the impugned provisions are inconsistent or contrary to the provision of art 152 of the Federal Constitution.

[22] Leaving the issue of the legislative competency of Parliament to enact the impugned provisions on one side for a moment, I am satisfied that the declaratory reliefs sought by the applicant not come within the ambit arts 4(3) and (4) of the Federal Constitution. The present leave application instituted by the applicant under art 4(4) is in essence, a challenge to the constitutional validity of the impugned provisions. This is not a case where declaration is sought that the impugned provisions are invalid on the ground that it is related to a matter with respect to which Parliament had no power to make such law. It would be wrong to conclude that this is a case where Parliament has strayed beyond matters within their legislative competence, with reference to the matters based on the legislative lists in the Ninth schedule. In substance, the primary declaration sought for in the present case is that the impugned provisions are inconsistent with art 152. If so, it would be void by reason of art 4(1). Hence, the declaratory reliefs sought for by the applicant are not within the exclusive original jurisdiction of the Federal Court. The declaratory reliefs sought for are within the original jurisdiction of the High Court. The High Court is competent to hear such challenges.

[23] As seen earlier, the proper mode to challenge the validity of a law has been explained in the case of *Ah Thian*. The Federal Court has held, among

A others, that the court's power to declare any law invalid on the ground that it is inconsistent with the Federal Constitution is not subject to any restrictions, and may be exercised by any court in the land.

B **[24]** By way of illustration, as pointed out by the learned SFC, in *Ah Thian*, the application for leave under art 4(4) to declare the Firearms (Increased Penalties) Act 1971 as ultra vires art 8(1) was dismissed. Suffian LP said:

> The applicant wants to attack the validity of the Firearms (Increased Penalties) Act not on the ground that it relates to a matter with respect to which Parliament has no
C power to make law. In my judgment, this Act deals with criminal law and the administration of justice, both matters with respect to which Parliament has power to make law (see item 4 of List I in the Ninth Schedule to the Constitution). The applicant says that the Act is invalid because it is inconsistent with the Constitution, ie on the ground (2) set out in para 9 above. Therefore cl (1) of Article 128 do not apply and the point may be raised in the ordinary way in the course of submission,
D and determined in the High Court, without reference to the Federal Court, and there is no need for leave of a judge of the Federal Court.

[25] In the same way, in *Nordin bin Salleh*, leave was refused in respect of one
E of the prayers and the Supreme Court held:

> As para (c) of the notice of motion was to seek a declaration that s 73 of the Council of Religion and Malay Custom Enactment 1966 is void on the grounds that it is inconsistent with the provisions of Article 10(1)(a) of the Federal Constitution and not on the grounds that it deals with a matter with respect to which the Kelantan
F legislature has no power to make it, the High Court has jurisdiction in the matter and leave of a Judge of the Supreme Court was not .

[26] It was also argued by learned counsel for the applicant to the effect that art 74(3) is relevant because it states that the power of Parliament to enact laws
G must be subject to such 'conditions or restrictions' contained in other Articles. According to learned counsel, art 152 contains such 'restriction', that is to say, only Bahasa Melayu may be used for education. As such, he argued, Parliament is powerless to enact the impugned provisions. I find it hard to accept this line of arguments. In the first place art 74 expressly provides:

H > 74(1) ...
>
> (2) ...
>
> (3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this
I Constitution.

[27] In my judgment, the above constitutional provisions highlight the fundamental principle relating to the power of Parliament to make law in respect of a particular matter pursuant to art 74(1) of the Federal Constitution.

Contrast this with art 4(3) that allows a law to be challenged on the ground that Parliament has legislated on a matter that it had no power at all to do. If Parliament had legislated on a matter that it has power but the legislation is contrary to any conditions or restrictions imposed with respect to any particular matter by the Federal Constitution, such legislation is unlawful.

[28] In *Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri' Ayatuddin Al Mu' Adzam Shah* [1996] 1 MLJ 617 ('Faridah Begum'), the plaintiff who was a Singapore citizen, sued the Sultan of Pahang in his personal capacity for alleged libel and for damages in the Special Court established under art 182 of the Federal Constitution. The court had to consider whether a Singaporean citizen could sue a Ruler in the Special Court under art 182. Eusoff Chin CJ in his judgment states as follows:

> Therefore, even if Parliament were to confer by express language under art 182, any right on a Singapore citizen to sue the Yang di-Pertuan Agong or a Ruler, such conferment of right is unlawful under art 155 and is of no effect, unless similar right is given to a Malaysian citizen in Singapore to sue the Singapore President. It is true that our Parliament has wide legislative powers to make laws under arts 73(a) and 74 of the Constitution. But Article 74(3), which states, restricts such power:
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> 74(3) the power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.
>
> In this particular case, Parliament's legislative power is subject to the special provision of art 155 of the Constitution, so that even if Parliament were to confer a right on a Singapore citizen to sue the Yang di-Pertuan Agong or a Ruler, such conferment of right is illegal and ultra vires art 155.

[29] It is thus clear that where Parliament has the legislative competence to enact a law, the constitutional validity of the law still depends on any conditions or restrictions imposed with respect to any particular matter by the Federal Constitution. The constitutionality validity of the law can then be challenged in the High Court and in such a situation the matter is not within the exclusive original jurisdiction of the Federal Court. An important point to note is that in *Faridah Begum*'s case, the determination of the issue of illegality of the relevant provisions was not preceded with leave of a judge of the Federal Court under art 4(4) of the Federal Constitution. Article 74(3) of the Federal Constitution therefore is of no support to applicant's contention.

[30] At this juncture, it is opportune that I refer to the case of *Merdeka University*, that was cited by learned counsel for the applicant to support his arguments that Parliament had no powers to make the impugned provisions and therefore the provisions are invalid. Heavy reliance is placed by learned counsel on a passage of the judgment of the Federal Court to the effect that if

Merdeka University is established, it would be a public authority and that there is no right therefore to use the Chinese language as the main medium of instruction for the official purpose, of which the use may be prohibited under art 152 of the Federal Constitution. It is necessary to appreciate what that case concerns. In that case, the Government of Malaysia rejected the Merdeka University's petition to establish a private university called Merdeka University on the following grounds: the University would use Chinese as the medium of instruction; the University would cater for students from Chinese independent; secondary schools; and the University would be set up in the private sector, and its establishment would be contrary to the National Education Policy. As a result, Merdeka University filed a suit in the High Court seeking declarations that such a rejection was null and void because it contravened the Federal Constitution, and was an unreasonable and improper exercise of the Yang Di-Pertuan Agong's discretion conferred upon by s 6 of the Universities and University Colleges Act 1971. The issue in that case is essentially whether the Government had acted constitutionally, reasonably and fairly; was there also any proper basis in law for His Majesty to not be satisfied that it is 'expedient in the national interest' to establish Merdeka University as per s 6 of the Universities and University Colleges Act 1971. The suit was dismissed by the High Court and the Federal Court subsequently dismissed Merdeka University's appeal. From the foregoing background of the case, it is clear that the main issue in *Merdeka University* was whether there was a contravention of art 152. The question before the Federal Court in *Merdeka University* is therefore irrelevant to the question in the present application. There the Federal Court was not called upon to decide whether Parliament made a law on a matter that is not in the Federal list. I do not think that the case takes the applicant's case very far in the present application before me. It appears that *Merdeka University* case is directly relevant where a constitutional challenge is taken that the impugned provisions are inconsistent with art 152 of the Federal Constitution.

[31] To take the discussion further, the determination on Parliament's legislative competency has been clearly stipulated in art 74(1) of the Federal Constitution where it provides that Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List, that is to say, the First or Third List sets out in the Ninth Schedule. As seen earlier, s 28 of the Education Act 1996 allows the Minister to establish national schools and national-type schools. Section 17 of the same Act allows such schools to be exempted from using the national language as the main medium of instruction. However the national language shall be taught as a compulsory subject. In my judgment, these are areas in which Parliament may make laws with respect to matter on 'Education'. Matter on education is clearly spelt out under item 13 of the First List in the Ninth Schedule.

[32] In this regard, learned counsel for the applicant made a simple point. He pointed out that item 13 does not contain any provision relating to medium of instruction in Chinese and Tamil schools. Hence, he argued that Parliament had no power to make the impugned provisions and therefore those provisions are invalid. In my view the contention of learned counsel is not free from difficulties. There are two problems with this line of arguments. First, the words 'with respect to' in art 74 must be interpreted with extensive amplitude. As observed by the Court of Appeal in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23 in relation to the identical words:

> It is also well settled that the phrase 'with respect to' appearing in art 74(1) and (2) of the Federal Constitution — the provision conferring legislative power upon the Federal and State Governments respectively — is an expression of wide import. As observed by Latham CJ in Bank of *New South Wales v The Commonwealth* (1948) 76 CLR 1 at p 186, in relation to the identical phrase appearing in s 51 of the Australian Constitution which confers Federal legislative authority:
>
> > A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary — as wide as that of the Imperial Parliament itself: *R v Burah* (1878) 3 App Cas 889; *Hodge v R* (1883) 9 App Cas 117. But the power is plenary only with respect to the specified subject.

[33] Secondly, parliament derives its legislative power from art 74 of the Federal Constitution. In *Gin Poh Holdings Sdn Bhd*, the Federal Court held that the function of the entries in the Legislative Lists in the Ninth Schedule is not to confer powers of legislation, but merely to demarcate the fields in which legislative bodies operate. The Federal Court summarised the principles applicable to the interpretation of entries in the legislative lists as follows:

(a) the entries in the legislative lists do not confer legislative power. Rather, they are broad heads or fields of legislation to demarcate the respective areas in which Parliament and the State *Legislature* may operate;

(b) the entries must be interpreted liberally with the widest amplitude, and not narrowly or restrictively. Each entry extends to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in it;

(c) the rule of widest construction does not permit an entry to be interpreted so as to include matters with no rational connection to it or to override or render meaningless another entry;

(d) in the event of apparent conflict or overlap between entries, the court should attempt to reconcile the entries by adopting a harmonious construction; and

(e) in interpreting a particular entry, the court should confine its decision to the concrete question arising from the case, without pronouncing a more exhaustive definition than is necessary.

[34] It is plain for us to see that the impugned provisions are in respect of 'education', which is a broad head or field of legislation over which Parliament can operate. It cannot be disputed that the impugned provisions have rational connection to the field of education. It is true that the word 'Education' in item 13, Federal List, Ninth Schedule is followed by a number of examples or illustrations as follows:

(a) elementary, secondary, and university education; vocational and technical education; training of teachers; registration and control of teachers, managers and schools; promotion of special studies and research; scientific and literary societies;

(b) libraries; museums; ancient and historical monuments and records; archaeological sites and remains.

[35] This however does not curtail the effect of the general word 'education'. Article 74(4) expressly provides that where general as well as specific expressions are used in describing any of the matters enumerated in the lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter. In my judgment, the specific words in the entry by way examples or illustrations serve to amplify rather than to restrict the scope of the general word. As lucidly explained by MP Jain in *Indian Constitutional Law* (6th Ed, India: *LexisNexis Butterworths* Wadhwa Nagpur, 2010) at p 574 (cited with approval by the Federal Court in *Gin Poh Holdings):*

> The framers of the Constitution wished to take a number of comprehensive categories and describe each of them by a word of broad and general import. For example, in matters like 'Local Government', 'Education', 'Water', 'Agriculture', and 'Land', the respective entry opens with a word of general import, followed by a number of examples or illustrations or words having reference to specific sub-heads or aspects of the subject matter. The effect of the general word, however, is not curtailed, but rather amplified and explained, by what follows thereafter.

[36] Hence, in my judgment, there can be no doubt that it is well within the realm of the Parliament's power to enact the impugned provisions. The Parliament's legislative competency issue to enact the impugned provisions rests there. Viewed in this way, the legislative competency of Parliament to enact the impugned provisions is not in issue. Thus, the question of leave under art 4(4) does not arise. This leave application is therefore wholly misconceived.

CONCLUSION

[37] In consequence and in view of all the above, this leave application must be dismissed.

[38] As the present proceedings are before this court in the exercise of its original jurisdiction, s 83 of the Courts of Judicature Act 1964 provides that no costs are to be made.

Application dismissed.

Reported by Ashok Kumar